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No. 57821-9-I

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Court of Appeals, Division I, of the State of Washington

BIANCA FAUST, individually and as guardian of GARY C. FAUST, a minor, and BIANCA CELESTINE MELE, BRYAN MELE, BEVERLY MELE, and ALBERT MELE,

Respondent/Cross-Appellants,

v.

MARK ALBERTSON, as Personal Administrator for the ESTATE OF HAWKEYE KINCAID, deceased, Respondent, and BELLINGHAM LODGE #493, LOYAL ORDER OF MOOSE, INC., and ALEXIS CHAPMAN,

Defendants-Appellants,

MOOSE INTERNATIONAL, INC., and JOHN DOES (1-10),

Respondents.

REPLY BRIEF AND CROSS-APPELLEES' BRIEF OF BELLINGHAM LODGE #493, LOYAL ORDER OF MOOSE, INC. AND ALEXIS CHAPMAN

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REPLY ARGUMENT

I.

THE COURT ERRED BY ENTERING JUDGMENT FOR PLAINTIFFS AND BY DENYING DEFENDANTS' MOTIONS FOR JUDGMENT OR NEW TRIAL BASED ON THE INSUFFICIENCY OF EVIDENCE AS TO THE OVER-SERVICE OF ALCOHOL TO KINCAID.

Plaintiffs' claim is self-contradictory and even implausible. Plaintiff Bianca Mele testified that after reading 7:28 on her car clock, she looked up and saw Kincaid driving towards her (RP 91). The accident happened just south of Ferndale, about seven miles north of and 14-17 minutes away from the lodge (RP 919-20, 1238). Kincaid was driving towards the lodge, not away from it (RP 168-69, 1373-74). Yet, plaintiffs' expert Saferstein assumed that Kincaid drank at the lodge until 7:30 p.m. and was in the accident by about 7:46 p.m. (RP 235). Under Saferstein's assumption, Kincaid had to hop in his van, drive northbound past the accident scene, turn around at an unknown point and time, and drive southbound to the accident scene, all within sixteen minutes.

Plaintiffs' case was worse than implausible. It was legally insufficient. Viewing the evidence in plaintiffs' favor, plaintiffs did not prove that defendants served Kincaid when he was apparently intoxicated. Defendants are entitled to JMOL or a new trial.

Defendants did not misstate the standards of review (Pl. 29). JMOL motions are reviewed under "the same standard as the trial court," which makes review *de novo*. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn. 2d 907, 32 P.3d 250, 254 (2001). As for the motion for a new trial based on insufficiency of evidence, defendants did not misapply *Lockwood v. AC&S, Inc.*, 109 Wn. 2d 235, 243, 744 P.2d 605 (1987). There, the Supreme Court simultaneously reviewed the denial of motions for directed verdict, JNOV, and new trial for insufficiency of the evidence. It did not mention the abuse of discretion standard. 109 Wn. 2d at 242-48, 744 P.2d at 610-13. In *Hizey v. Carpenter*, 119 Wn. 2d 251, 272, 830 P.2d 646, 657 (1992), the Court applied the *Lockwood* standard in a motion-for-new-trial context ["The standard of review of denial of a motion for new trial is the same as that of a motion for judgment n.o.v. (now JMOL)"]. See also *Lian v. Stalik*, 106 Wn. App. 811, 823-24, 25 P.3d 467, 475 (2001) (review of motion for new trial under JMOL standard).

Plaintiffs' citations as to the abuse-of-discretion standard are distinguishable (Pl. 31). None involves a motion for new trial based on the insufficiency of evidence. *Palmer v. Jensen*, 132 Wn. 193, 197-98, 937 P.2d 597, 599 (1997) (damages); *Aluminum Company of America v. Aetna Casualty & Surety Co.*, 140 Wn. 2d 517, 537, 998 P.2d 856, 869 (2000) (trial counsel misconduct); *James v. Robeck*, 79 Wn. 2d 864, 490

P.2d 878, 879 (1971) (remittitur); *Bunch v. King County Department of Youth Services*, 155 Wn. 165, 116 P.3d 381 (2005) (same). In *Bunch*, the Court even recognized the similarities between a motion for new trial and a JMOL motion based on insufficiency of evidence. 155 Wn. at 176 n.6, 116 P.3d at 387-88.

Actually, plaintiffs misapply the standard of review because they ignore a crucial element of it. For evidence to be considered in plaintiffs' favor, it must be "competent." *Guijosa*, 32 P.3d at 254. Plaintiffs' evidence was not competent to show that Kincaid was apparently under the influence of alcohol when Chapman served him.

Plaintiffs over-reach with *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn. 2d 259, 96 P.3d 386 (2004). *Barrett* involves a limited issue — the ***level*** of intoxication that a patron must show. Under *Barrett*, a patron need not appear "obviously intoxicated;" he only needs to be "apparently under the influence" of alcohol. 152 Wn. 2d at 266-75, 96 P.3d at 389-93. But *Barrett* did not discuss the ***type*** of evidence needed to prove apparent intoxication.

Plaintiffs' analysis of that issue fails to distinguish between intoxication and over-service. As part of their case, plaintiffs needed to prove that Kincaid was intoxicated when he struck plaintiffs. On that

issue, they could offer circumstantial evidence about Kincaid's blood alcohol level and about the effect of that level on an average person.

But proof of intoxication was insufficient for plaintiffs to recover. Plaintiffs also needed to prove over-service, and the standard for proving over-service is far different from the standard for proving intoxication. Time and again, the Supreme Court has rejected the use of circumstantial evidence to prove over-service. In *Shelby v. Keck*, 85 Wn. 2d 911, 541 P.2d 365, 368-69 (1975), the Court stated:

> It is our considered opinion that one ***cannot logically or reasonably infer*** that Keck was intoxicated merely from the fact that he was in the establishment for several hours. Even if Keck had consumed more than two drinks, his state of sobriety ***must be judged by the way he appeared to those about him, not by what a blood alcohol test later revealed.***

(emphasis supplied). In *Wilson v. Steinbach,* 98 Wn. 2d 434, 656 P.2d 1030, 1033 (1982), the Court reaffirmed *Shelby* as stating "[t]he settled rule in this state as to actions based on the *Halvorson* line of cases." Plaintiffs claim here is part of the *Halvorson* line (Pl. 15-16). Contrary to plaintiffs' argument, *Wilson* is good law. *Purchase v. Meyer*, 108 Wn. 2d 220, 226, 737 P.2d 661, 665 (1987) (citing *Wilson* with approval).

In *Purchase*, the Supreme Court made even more pronounced its prohibition against using circumstantial evidence as proof of over-service:

> CONCLUSION. Insofar as a cause of action for furnishing intoxicating liquor to an "obviously intoxicated" person is concerned, ***the results of a blood alcohol test (by an alcohol blood testing machine) and an expert's opinions based thereon, and the physical appearance of that person at a substantial time after the intoxicating liquor was served***, are not by themselves sufficient to get such a cause of action past a motion for summary judgment. Whether a person is "obviously intoxicated" or not ***is to be judged by that person's appearance at the time the intoxicating liquor is furnished to the person.***

108 Wn. 2d at 233, 737 P.2d at 663 (emphasis supplied). The Court found that a pharmacologist's affidavit purportedly relating a patron's blood alcohol content back to the time of service to establish "obviousness" was legally infirm and speculative. *Id.* at 226-27, 737 P.2d at 665. The Court concluded that there was "no competent evidence" that plaintiff was over-served. *Id.* at 227, 737 P.2d at 665. Plaintiffs mislabel *Purchase* as a "social host" case (Pl. 21, 23). *Purchase* involved a "commercial purveyor" of alcohol. *Id.* at 221, 737 P.2d at 662.

The Supreme Court repeated the *Purchase* holding in *Christen v. Lee*, 113 Wn. 2d 479, 487-88, 780 P.2d 1307, 1311 (1989):

> In *Purchase*, we articulated several reasons ***why resort must be had to evidence of a person's appearance in order to determine whether that person was obviously intoxicated.*** First, we noted that a furnisher of intoxicating liquor ordinarily has no way of knowing how much alcohol a person has consumed before entering an establishment. Next, we observed that a person who is a heavy drinker may be legally intoxicated yet still not appear intoxicated. Finally, we explain that there are medically recognized

> variables in the way that alcohol may react on the human body.

Id. at 489, 780 P.2d at 1311 (emphasis supplied). Absent evidence that Kincaid was observed to be apparently intoxicated when served, plaintiffs failed to prove over-service.

Plaintiffs mistakenly rely on *Dickinson v. Edwards*, 105 Wn. 2d 457, 716 P.2d 814 (1986), for the notion that circumstantial evidence may be used to prove over-service. In three Supreme Court cases, *Dickinson* has been labeled "factually unique." *Christen*, 113 Wn. 2d at 490, 780 P.2d at 1312; *Purchase*, 108 Wn. 2d at 227-28, 737 P.2d at 665; *Burkhart v. Harrod*, 110 Wn. 2d 381, 392, 403, 755 P.2d 759, 764, 770 (1988) (Utter and Brachtenbach, J.J., *concurring*). In *Dickinson*, defendant admitted to consuming 15-20 drinks at an establishment in 3-1/2 hours. 716 P.2d at 818. A police officer observed him just ten minutes after he left the establishment. Defendant was "unsteady on his feet, had bloodshot eyes and a flushed face, and smelled of alcohol;" he also failed a physical performance test. *Id.* at 876. Here, Kincaid never mentioned his level of drinking, and observers only saw Kincaid consume two drinks at the lodge. Plaintiffs offered no evidence as to Kincaid's appearance after he left the lodge. According to the medical examiner, Kincaid was "essentially dead at the scene" (RP 186-87).

Plaintiffs argue that according to defendants, " 'heavy' or 'very experienced' drinkers are entitled to get even more drunk than the 'average' drinker" (Pl. 21). They state that defendants "offer no authority for their understanding of the physiology of drinking" (*Id.*). They suggest that defendants seek "a 'free pass' for heavy drinkers to run amok on Washington's highways freely wreaking havoc . . ." (*Id.*). Plaintiffs' comments are both unfair and incorrect. Under the DUI statute, no one may drive while over the legal limit — regardless of tolerance level. RCW 46.61.506(1). But this is not a DUI case. It is an over-service case. As for the physiology of drinking, defendants' understanding came from *Purchase*, which cites relevant literature. 108 Wn. 2d at 225-26 n. 11, 737 P.2d at 664. Plaintiffs' own authority recognizes that "alcohol affects everyone differently." Washington State Liquor Control Board, *Handbook For Liquor Licensees*, www.liq.wa.gov/publication/ onpremiseslicenseehandbook.pdf; (Pl. 5). So does plaintiffs' expert Saferstein (RP 244). So does the controlling case law. *Purchase*, 108 Wn. 2d at 225-26; *Christen*, 113 Wn. 2d at 489, 780 P.2d at 1311. Circumstantial evidence only works where the law imposes one-size-fits-all liability based on a hypothetical "average" drinker. It has no application where the law recognizes differences among drinkers. Direct observational evidence is needed.

In short, circumstantial evidence was not competent evidence to support plaintiffs' over-service claim.

Because plaintiffs misread the law, they misapply the evidence. The testimony of Goldfogel and Saferstein was not competent to prove over-service. Neither witness observed Kincaid at the lodge (RP 206, 228). Goldfogel merely explained the cause of death, evidence that did not prove over-service. Saferstein offered general facts about alcohol absorption and elimination (RP 225-27). He testified to blood alcohol tests taken no earlier than one hour after the accident (RP 228-29). His opinions were based on his own assumption that Kincaid drank at the lodge and nowhere else (RP 234-35). Based on the post-accident testing, Saferstein worked backwards to opine Kincaid's blood alcohol level at 7:46 p.m. (not 7:28 p.m. as admitted by Mele). From there, Saferstein opined about the effect of that level of alcohol on an average drinker (RP 236-243). Saferstein's evidence was exactly what *Purchase* deemed to be ***not*** competent evidence. 108 Wn. 2d at 226-27, 737 P.2d at 665. Saferstein did not even relate his testimony to the time when Kincaid was last served — a time that plaintiffs never established.

Plaintiffs rely on the testimony of hospitality expert Denny Rutherford that Chapman deviated from training standards by serving liquor to her boyfriend (Pl. 34). Rutherford's testimony was irrelevant to

the over-service issue. He was called to testify about the relationship between International and the lodge and about plaintiffs' negligent hiring/supervision claim (RP 1066-1122). He neither observed Kincaid's condition nor testified that Chapman over-served him (*Id.*). In the context of plaintiffs' over-service claim, Chapman's training is a red herring. If a server provides alcohol to an apparently intoxicated patron, liability exists regardless of the server's level of training. Conversely, if the drinker was not apparently intoxicated, a failure to train the server will be inconsequential.

Plaintiffs' argument about lodge members' supposed incentive to lie does not satisfy the JMOL standard. Plaintiffs ignore the distinction between substantive and impeachment evidence. *Halder v. Department of Labor & Industries of State*, 44 Wn. 2d 537, 268 P.2d 1020, 1023 (1954); *State v. Fliehman*, 35 Wn. 2d 243, 212 P.2 794, 795 (1949). Lodge member bias does not establish that the members observed Kincaid to be apparently intoxicated. For example, they might have seen him drink more than two beers yet not show signs of intoxication. *Purchase*, 108 Wn. 2d at 226, 737 P.2d at 664 (". . . the heavy drinker may still not appear intoxicated even with a blood alcohol level above .20%"). They might not have been present at the lodge to observe Kincaid. Evidence of bias just allows a jury to reject a witness' substantive evidence. It does

not allow plaintiffs to transform a witness' testimony into evidence that plaintiffs like.

Similarly, plaintiffs' attacks on the Pope and Zoerbe testimony did not support the judgment. Whether Kincaid was drinking in a bowling alley, the Pioneer, his van, or elsewhere is irrelevant. In fact, whether Kincaid was intoxicated when he left the lodge was inadequate proof by itself. The critical issue was whether Chapman served Kincaid when he was apparently intoxicated.

And as to both the lodge members and Pope, plaintiffs ignore a crucial point. Plaintiffs owned the burden of proving their case. Defendants did not need to disprove it. Plaintiffs were not entitled to judgment merely by contesting defendants' evidence.

The dispute about the time of Kincaid's departure from the lodge is academic. Defendants' opening brief assumed *arguendo* that Kincaid left the lodge at 7:30 p.m. and was intoxicated at the time (Def. 21). Besides, there is really no genuine dispute. Plaintiff Bianca Mele saw her car clock read 7:28 just before the accident (RP 91). In light of Mele's testimony, the testimony of plaintiffs' investigator Scott Hatten that Kincaid left at 7:30 p.m. is wrong (RP 364). Ron Beers' declaration that Kincaid left between 7:15 and 7:30 p.m. was substantively inadmissible (Def. 28-29; Reply 14-19). Kincaid could not have left at 8:00 p.m. as thought by

Frank Rose because the police were dispatched at 7:46 p.m. (Pl. 7; Pl. Ex. 10). Regardless of the time, plaintiffs needed to prove over-service.

On that issue, there is no competent evidence. Plaintiffs offer virtually no analysis of the testimony of Rainy Kincaid and Lisa Johnston. Their testimony was so important that without it the trial court would have granted JMOL to defendants (CP 840). Plaintiffs analyze it in a five-line paragraph, and they do so incorrectly (Pl. 31-32).

Neither Rainy Kincaid nor Lisa Johnston testified that Chapman admitted to serving Kincaid when he was drunk (Pl. 6, 31). Plaintiffs' questioning of Rainy Kincaid was specifically directed to the time that Kincaid left the lodge:

> Q. And did she describe [Kincaid's] condition ***when she told him to leave***?
>
> A. Yeah, she knew that he was tipsy, that he shouldn't be behind the wheel.
>
> * * *
>
> Q. And the second time that she talked to you, did she again indicate what his condition was ***when he left the Moose Lodge***?
>
> * * *
>
> A. That he had been drinking for quite awhile.

(RP 266, 267-68; emphasis supplied). This testimony reveals a huge gap in plaintiffs' proof. Plaintiffs did not establish either the time when

Kincaid was last served or his condition at that time. Kincaid might have been fine when served but shown signs of intoxication when he left.

Lisa Johnston's testimony supports that scenario. According to Johnston, Chapman stated that "[Kincaid] was sitting at the bar and he was being obnoxious and that he was drunk, and she cut him off and he got mad [and left]" (RP 336). That was at a time ***after*** service. Because the Kincaid/Johnston testimony only established Kincaid's condition when he left, it failed to prove over-service.

Plaintiffs' arguments about the jury instructions do not defeat defendants' motions for JMOL and new trial (Pl. 24-28). Plaintiffs mislabel the instructional error issue as defendants' "central argument," then argue that defendants waived it (Pl. 24, 27). Plaintiffs are wrong as to both points. Defendants' JMOL/new trial argument is not defendants' "central argument" (Pl. 24). Each of defendants' arguments is important, and each supports reversal on its own merits. Defendants placed the JMOL/new trial issue first because it seeks the broadest relief. As to waiver, there has been none. Defendants objected to the court's instructions, tendered their own instructions, and assigned error to the court's rulings (CP 1111, 1121, 1138, 1142; A. 1-2; RP 1776-79, 1839-40, 1841). That is all the law requires. *State v. Hickman*, 135 Wn. 2d 97,

101-02, 954 P.2d 900, 902 (1998)[1]. Defendants further discuss the issue at Argument V, where the discussion belongs.

Plaintiffs argue that the judgment should be affirmed because the jury ruled in plaintiffs' favor on their negligent hiring/supervision claim (Pl. 13 n. 7). That claim must also fall. To establish tort liability, a plaintiff must prove proximate causation. *Christensen v. Royal School District No. 160*, 156 Wn. 2d 62, 66, 124 P.3d 283, 285 (2005). In *Peck v. Siau*, 65 Wn. App. 285, 288, 827 P.2d 1108, 1110 (1992), a negligent hiring/retention case, the Court of Appeals stated:

> It is, of course, necessary to establish such negligence as a proximate cause of the damage to the third person, and this requires that the third person must have been injured by some negligent or other wrongful act of the employee so hired.

Plaintiffs needed to prove that the lodge's alleged negligence proximately resulted in Chapman's over-serving Kincaid. Because plaintiffs failed to prove over-service, they also failed to establish the lodge's liability for negligent hiring and supervision.

Although plaintiffs suffered injuries, without proof of liability they may not recover for them. Plaintiffs obtained a judgment against

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[1] Washington practice differs from federal practice. Under federal law, the failure to object to an instruction does not waive an argument that evidence was legally insufficient to support a verdict. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 513-14, 108 S.Ct. 2510 (1988).

Kincaid's estate based upon its admission of liability for Kincaid's drunk driving. That was not enough to establish the lodge defendants' liability. Because plaintiffs failed to offer competent and legally sufficient evidence of over-service, defendants are entitled JMOL or a new trial.

II.

THE COURT ABUSED ITS DISCRETION BY ALLOWING PLAINTIFFS TO USE THE DEPOSITION AND *EX PARTE* DECLARATION OF RON BEERS.

Under appropriate circumstances, depositions and *ex parte* declarations may be used at trial for substantive and/or impeachment purposes. Those circumstances were absent here.

Plaintiffs argue that the Beers deposition had substantive value because Beers' testimony "related to the events in this case and was probative of Kincaid's whereabouts on the day in question" (Pl. 39). On the contrary, Beers did not recall being in the lodge on the night of the accident (CP 962 at 16-17; CP 969 at 43). And Beers had never seen anyone, including Kincaid, appear intoxicated while Chapman was bartending (CP 965 at 28; CP 966 at 30-33; CP 968 at 40-41). Moreover, defendants did not "believe Beers' testimony to be consequential to their version of facts" (Pl. 40). During defendants' case, Larry Rayborn testified that Beers was not present at the lodge (RP 1298). Defendants had no reason to call Beers.

As for the Beers declaration, it had no substantive value because it was substantively inadmissible hearsay under ER 801(d)(1). Defendants do not argue that the Beers declaration was inadmissible because it was *ex parte* (Pl. 40). Rather, the *ex parte* declaration was inadmissible because it was not given "at a trial, hearing, or other proceeding, or in a deposition." ER 801(d)(1). Washington law is no less strict than federal law on this subject. ER 801 " 'conforms state law to federal practice.' " *State v. Smith*, 97 Wn. 2d 856, 651 P.2d 207, 209 (1982).

Plaintiffs' cases applying ER 801(d)(1) actually support defendants. In *Smith*, the Supreme Court approved the use of a verbatim statement given by a victim on a form containing Miranda warnings. It was signed before a notary public and taken as standard procedure for determining probable cause. The Court stated that "reliability is the key" to substantively using a statement. 651 P.2d at 210. The Court found sufficient indicia of reliability because the victim wrote the statement, attested to it before a notary public, and appeared before the jury for live cross-examination. *Id.* at 210. In *State v. Thach*, 126 Wn. App. 297, 106 P.3d 782 (2005), a victim voluntarily gave an affidavit and a written domestic violence victim statement. They were taken as standard procedure to determine probable cause. A police officer witnessed her signature and forwarded the statement to the prosecutor. The victim

submitted to live cross-examination before the jury. In *State v. Nelson*, 74 Wn. App. 380, 874 P.2d 170 (1994), a witness gave a police officer and deputy prosecutor a written statement and an affidavit attesting to its truth. A notary testified to her standard procedure of asking whether the witness had read the affidavit. The officer reviewed the statement with the witness and explained the significance of the affidavit. The statement had been given as standard procedure for the filing of a criminal information. The witness appeared live in court to testify.

Plaintiffs' cases are far removed from this one. The Beers declaration was not part of a police investigation of criminal activity. No police officer or attorney was present. The statement was taken by an investigator hired by plaintiffs who paid surprise visits on Beers (RP 961 at 10, 13). Plaintiffs' investigator typed the statement and hand-wrote the addendum (RP 961 at 12; RP 962 at 15). The typed portion was supposedly based on a tape recording that the trial court correctly excluded from evidence (RP 498-99, 921-24). The investigator did not testify whether he asked whether Beers had read the statement and understood its significance (RP 918-25). Beers testified that he did not read the statement and that the investigator merely stated: "It's typed. Sign it." (CP 962 at 14; CP 969 at 44). Beers denied his receiving a copy of the declaration from plaintiffs' investigator (CP 962 at 14). And

plaintiffs did not bring Beers to testify live or offer a video deposition so that the jury could actually see him and determine whether to believe his deposition or declaration. The declaration was unreliable and not within the "other proceeding" requirement of ER 801(d)(1). It was substantively inadmissible hearsay. ER 802.

The declaration was also inadmissible for impeachment purposes. Plaintiffs introduced the Beers deposition primarily if not solely to impeach Beers with the inadmissible declaration — a tactic condemned by *State v. Hancock*, 109 Wn. 2d 760, 763-64, 748 P.2d 611, 613 (1988). See also *State v. Allen, S.*, 98 Wn. App. 452, 465, 989 P.2d 1222, 1229 (1999). Plaintiffs mistakenly argue that *Hancock* is limited to criminal cases (Pl. 39). The *Hancock* rule is designed to prevent abuses of ER 607, which applies in criminal and civil cases. ER 1101(a). The *Hancock* rule prevents litigants from circumventing the hearsay rules and confusing juries about the distinction between impeachment and substantive evidence. *Hancock*, 109 Wn. 2d at 763, 740 at P.2d at 613. There is no reason why such abuses should go unchecked in civil cases.

The court's rulings as to Beers prejudiced defendants. To establish prejudice, defendants do not need to show that an error "had an actual impact on the outcome of the case" (Pl. 36). That standard is unreachable unless jurors choose to talk about their deliberations. Defendants need

only show that "within reasonable probabilities, the trial's outcome would have been materially affected had the error not occurred." *Cobb v. Snohomish County*, 86 Wn. App. 223, 236, 935 P.2d 1384, 1392 (1997). By rejecting defendants' instruction that the declaration was inadmissible for the truth of matters asserted in it, the court let the jury treat either the deposition or the declaration as substantive evidence (CP 975; RP 496, 906-07). Immediately after reading the ***declaration***, the court even stated: ***". . . that's the gist of that deposition. You may consider that as the testimony of Mr. Beers. . ."*** (RP 909; emphasis supplied). The comment effectively united the deposition and declaration and allowed the jury to decide which version to substantively accept.

Giving the jury that option was particularly harmful in light of Beers' statements in the declaration. Beers stated that Chapman had previously served Kincaid "when it was obvious that he was intoxicated" (RP 909). Moreover, Beers put Kincaid in the lodge close to the time of the accident, which could impeach the defense explanation offered through Pope and Zoerbe (RP 909). And by allowing Beers' declaration, the court gave undeserved credibility to plaintiffs' "conspiracy of silence" theme (Pl. 37 n. 25). It likely caused the jury to disbelieve the other lodge members. In a case where no one observed Kincaid to be apparently

intoxicated, these errors had a reasonable probability of affecting the outcome. Defendants deserve a new trial.

III.

THE COURT ABUSED ITS DISCRETION BY ALLOWING PLAINTIFFS TO QUESTION DEFENSE WITNESS MAC POPE IN THE JURY'S PRESENCE ABOUT DRINKING PRIOR TO TESTIFYING.

Defendants did not waive this issue (Pl. 43). Defendants objected during a sidebar to any questioning about drinking as being without a factual basis (CP 845-48; RP 1262-63, 1355). Immediately after the court's ruling, plaintiffs asked about drinking (RP 1263). Defendants were not required to object in the jury's presence and so highlight the prejudice. Defendants preserved the error. CR 46 (objection sufficient).

Defendants were also not required to request a competency hearing (Pl. 43). If the court believed that Pope could not testify correctly, it had an independent duty to conduct a hearing. *State v. Watkins*, 71 Wn. App. 164, 173, 857 P.2d 300, 305 (1993). Plaintiffs incorrectly argue that *Watkins* would not require a hearing here. The Court stated:

> . . . ***absent manifest signs of incompetence***, it would be inconsistent with public policy to impose upon the trial courts *sua sponte* duty to inquire into the competence of witnesses with known mental disabilities, and we decline to do so.

71 Wn. App. at 173, 857 P.2d at 305 (emphasis supplied). The court knew that Pope suffered from alcohol abuse and said that it smelled liquor as soon as Pope sat down (RP 1231-32, 1355). Given the court's concern about Pope's ability to testify correctly, it needed to conduct a competency hearing.

And proper procedure required the court to do so in chambers. See *State v. Froehlich*, 96 Wn. 2d 301, 635 P.2d 127, 128 (1981) (jury excused); *State v. Bishop*, 51 Wn. 2d 884, 322 P.2d 883, 884 (1958) (outside jury's presence). It was unnecessary for RCW 5.60.050 to set forth the proper procedure. The procedure is apparent — a court gathers evidence on the subject. That should occur outside the jury's presence so that no one is prejudiced.

Defendants were prejudiced because the court unfairly aired the issue before the jury. Although the court suggested that drinking affects credibility, there is no medical or legal authority supporting that notion (CP 840). *State v. Dault*, 19 Wn. App. 709, 719-20, 578 P.2d 43, 49 (1978) (drug use inadmissible to show lack of veracity). The mere suggestion of drinking is prejudicial, particularly when plaintiffs' attorney states aloud that he smells alcohol (RP 1263). That comment shifted to defendants an impossible burden to immediately disprove drinking. It also created an incentive for Pope to lie to cover his alcohol problems. The

questioning allowed the jury to disbelieve and distrust Pope, defendants, and their attorneys. And it unfairly created the spectacle of defendants putting a drunk on the stand in an over-service case. Over objection, plaintiffs reminded the jury during closing argument about Pope's alleged drinking (RP 1885-86). They even said that Pope "probably has a [drinking] disease," making it easier for the jury to conclude that Pope was drunk while testifying (RP 1886). Contrary to plaintiffs' argument, defendants raised the closing argument problem in their brief (Pl. 42 n.30; Def. 36-37).

Plaintiffs cannot negate the prejudice by arguing that Pope was impeached on such minor issues as his seat in the bowling alley, the color of Kincaid's shirt, and the container for Kincaid's beer (Pl. 46). As for Pope's failure to report his observations to the police, he had no reason or duty to do so (*Id.*). Besides, the prejudice went far beyond Pope. Plaintiffs' unfair questioning likely damaged the integrity of defendants and their attorneys. Defendants are entitled to a new trial.

IV.

THE COURT ABUSED ITS DISCRETION BY ALLOWING PLAINTIFFS TO OFFER INADMISSIBLE EVIDENCE UNFAIRLY IMPUGNING DEFENDANTS' INTEGRITY AND CREDIBILITY.

Plaintiffs' liability case was thin at best. Even the trial court thought so (RP 1840; CP 840). To counter that problem, plaintiffs unfairly attacked virtually anyone connected with The Moose — lawyers included. The trial court abused its discretion by letting it happen.

No waiver occurred from defendants' failure to request curative instructions (Pl. 47-48). The court overruled defendants' objections to plaintiffs' questions, so requesting a curative instruction would have been futile. Under CR 46, an objection was sufficient to preserve error.

A party has a right to challenge the credibility of its opponent's witnesses and even suggest a motive to lie. Plaintiffs were free to suggest the lodge members' association with the lodge as a reason for bias. But plaintiffs went far beyond arguing motive. Plaintiffs argued ***conduct*** — a "***pointed effort*** by members" to hide the truth in which members "***moved quickly*** to ***stop*** the flow of information" (RP 1869, 1871; emphasis supplied). It was plaintiffs' so-called "***shroud of silence***" — an alleged "***conspiracy***" (RP 1877; Pl. 31 n.25; emphasis supplied). They had no evidence to support their accusations, so to make them believable

plaintiffs preyed on juror prejudices. Of course, things like altars, oaths, and ceremonial robes do not turn someone into a liar. But they do make that person an easy target for a smear. Plaintiffs smeared decent people to deflect attention from their weak facts. "Racial animus" was not involved here, but social amicus certainly was (Pl. 49). And although unintentional, the court allowed " 'a feeling of prejudice to be engendered or located in the minds of the jury as to prevent [defendants] from having a fair trial.' " *Aluminum Company of America v. Aetna Casualty & Surety Co.*, 140 Wn. 2d 517, 537, 998 P.2d 856, 869 (2000). No objection was needed because a curative instruction would not have neutralized the prejudice. *Nelson v. Martinson*, 52 Wn. 2d 684, 320 P.2d 703, 706 (1958).

Plaintiffs also wrongly injected into jury questioning a legal dispute about discovery. Defendants did not waive the issue (Pl. 49). They sufficiently objected to plaintiffs' questioning, and the court allowed plaintiffs to proceed (RP 1653-55). Plaintiffs argue that their questioning of Glenn Strode showed how easily computer information could have been retrieved and so debunked defendants' discovery objections (Pl. 50). That argument proves defendants' point. During a pre-trial discovery dispute, defendants raised a legal objection that plaintiffs' requests were unduly burdensome. The jury neither received defendants' written objections nor would have known how to interpret them. The jury only received

plaintiffs' insinuation that defendants hid facts. Plaintiffs unfairly converted a legal dispute into a message that defendants were dishonest. Involving juries in legal matters creates a substantial potential for prejudice. *Loeffelholz v. Citizens for Leaders Ethics and Accountability Now*, 119 Wn. App. 665, 708-09, 82 P.3d 1199, 1222 (2004).

The prejudice was plain. The jury was mislead into believing that defendants and their attorneys actively participated in the so-called conspiracy. Given plaintiffs' weak liability case, the prejudicial inference that defendants withheld evidence probably convinced the jury that defendants were negligent. Defendants deserve a new trial.

V.

THE COURT ERRED IN INSTRUCTING THE JURY AS TO EVIDENCE OF KINCAID'S BLOOD ALCOHOL CONTENT AND AS TO CIRCUMSTANTIAL EVIDENCE.

As discussed at Argument I, defendants took all appropriate steps to preserve the instruction issue. The court's instructions 3 and 13 were wrong because circumstantial evidence is inadmissible to prove over-service. *E.g.*, *Purchase*, 108 Wn. 2d at 233, 737 P.2d at 663. Defendants' instruction 39 would have correctly limited the use of circumstantial evidence (A. 2).

Plaintiffs erroneously seek to apply the abuse of discretion standard to the instructions (Pl. 24-28). The issue here is a legal one — the type of evidence needed to prove over-service — and so review is *de novo*. *Thompson v. King Feed and Nutrition Service, Inc.*, 153 Wn. 2d 447, 453, 105 P.3d 378, 380 (2005). But under either standard, reversal is required.

Plaintiffs misinterpret defendants' instruction 36 (A. 1). It did not seek to exclude all evidence of Kincaid's blood alcohol content. That evidence was relevant to prove Kincaid's intoxication. The parties' experts were free to opine on the subject and to use circumstantial evidence in doing so. Defendants' instruction merely would have barred consideration of blood alcohol evidence "in deciding whether Hawkeye Kincaid was apparently under the influence of alcohol when Alexis Chapman served him alcohol on April 21, 2000" (A.1). *Shelby*, *Wilson*, *Purchase,* and *Christen* support the instruction.

An error of law in an instruction "is presumed to be prejudicial unless it affirmatively appears to be harmless." *State v. Clausing*, 147 Wn. 2d 620, 56 P.3d 550, 554 (2002); *Caruso v. Local Union No. 690*, 107 Wn. 2d 524, 530, 730 P.2d 1299, 1302 (1987) ("presumptively affects" outcome). There is nothing harmless about instructions that

allowed the jury to consider incompetent evidence as to over-service. Defendants deserve a new trial.

CROSS-APPELLEES' ARGUMENT

RCW 4.56.110 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES OR WASHINGTON CONSTITUTIONS.

Plaintiffs have waived this issue. The invited error doctrine " 'prohibits a party from *setting up an error* at trial and then complaining of it on appeal' " *In re Personal Restraint of Thompson*, 141 Wn. 2d 712, 723-24, 10 P.3d 380, 386 (2000) (emphasis in original). Plaintiffs invited error by failing to object to the interest rate and by actually presenting an order requesting interest at 6.002% (CP 1080-82).

RAP 2.5(a)(3) does not save plaintiffs. As an exception to the waiver rule, RAP 2.5(a) must be narrowly construed. *State v. WWJ Corp.*, 138 Wn. 2d 595, 602, 980 P.2d 1257, 1261 (1999). It applies where an uncorrected constitutional error would seriously harm an appellant and the system:

> . . . constitutional errors are treated specially under our RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. *Scott* 110 Wash. 2d at 686-87, 757 P.2d 492. On the other hand, "permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts".

State v. McFarland, 127 Wn. 2d 322, 333, 899 P.2d 1251, 1255-56 (1995) (warrantless arrest). Under RAP 2.5(a), an error must be " 'truly of constitutional magnitude.' " *Id.*

The alleged error here did not qualify because it did not affect plaintiffs' trial rights:

> The defendant must identify a constitutional error and show how, ***in the context of the trial***, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest", allowing appellate review.

McFarland, 127 Wn. 2d at 333, 899 P.2d at 1256 (emphasis supplied). A few years later, the Supreme Court repeated this limitation: " 'Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences ***in the trial of the case***' " *State v. WWJ Corp.*, 138 Wn. 2d at 603, 980 P.2d at 1261 (emphasis supplied) (fine not disproportionate to gravity of offense). Here, the alleged constitutional error was unrelated to the proof of liability or damages. The appropriate rate of post-judgment interest was a distinct issue. Until now, plaintiffs had agreed to and even requested interest at the statutory rate. RAP 2.5(a)(3) is inapplicable.

As to plaintiffs' federal constitutional argument, it has been waived for an additional reason. Even where RAP 2.5 applies, courts "will not review issues for which inadequate argument has been briefed or only

passing treatment has been made." *State v. Thomas*, 150 Wn. 2d 821, 868-69, 83 P.3d 970, 994 (2004). Plaintiffs' only mention of the federal equal protection clause was in the last sentence of their argument (Pl. 54). Plaintiffs did not cite any federal authority supporting their position. Plaintiffs' argument has been waived.

Plaintiffs are wrong as to their state constitutional challenge. A statute is presumed constitutional, and a party attacking it must prove its unconstitutionality "beyond a reasonable doubt." *State v. Thorne*, 129 Wn. 2d 736, 769-70, 921 P.2d 514, 530 (1996). Plaintiffs agree that the constitutionality of the RCW 4.56.110 must be analyzed under the rational-basis standard — " 'the most relaxed and tolerant form of judicial scrutiny under the equal protection clause.' " *DeYoung v. Providence Medical Center*, 136 Wn. 2d 136, 144, 960 P.2d 919, 923 (1998); (Pl. 53). Under it, a classification is valid unless "the classification rests on grounds wholly irrelevant to the achievement of legitimate state objectives." *State v. Harner*, 153 Wn. 2d 228, 235-36, 103 P.3d 738, 742 (2004). To be unconstitutional, the classification must be "purely arbitrary." *Thorne*, 129 Wn. 2d at 771, 921 P.2d at 531.

By arguing that RCW 4.56.110 "inexplicably require[s] a lower interest rate" for tort judgment creditors, plaintiffs misread the statute (Pl. 52). RCW 4.56.110(3) awards interest to tort judgment creditors at a

flexible rate tied into a federal treasury bill rate. Depending on the applicable federal rate, the state judgment rate for tort creditors may exceed the 12% rate for child support creditors. RCW 4.56.110(2). It may also exceed the rate available to contract creditors. RCW 4.56.110(1). So, plaintiffs' argument is based on a faulty premise.

Moreover, equal protection " 'does not require that things different in fact be treated in law as though they were the same.' " *Petersen v. State*, 100 Wn. 2d 421, 671 P.2d 230, 245 (1983). A legislative solution may proceed " 'one step at a time,' " and the legislature " 'may select one phase of one field and apply a remedy there, neglecting the others.' " *DeYoung*, 136 Wn. 2d at 149, 960 P.2d at 925. The legislature focused on tort creditors, who generally receive more, even millions more, than child support and contract creditors. Because of the huge sums involved in tort judgments, an interest rate not keyed to the economic conditions would effectively deprive losing parties of their appeal rights (*see* House Bill Report HB 2485 at 3) (R.A. 2-4, *infra*). By contrast, fixing the child support rate at 12% aids minors in receiving prompt payment from parents. Contract creditors continue to receive interest at rates agreed in advance. The classifications are neither irrational nor arbitrary.

Plaintiffs' cases are distinguishable (Pl. 53). None involves the interest statute here or a similar statute.

Plaintiffs' constitutional arguments should be rejected.

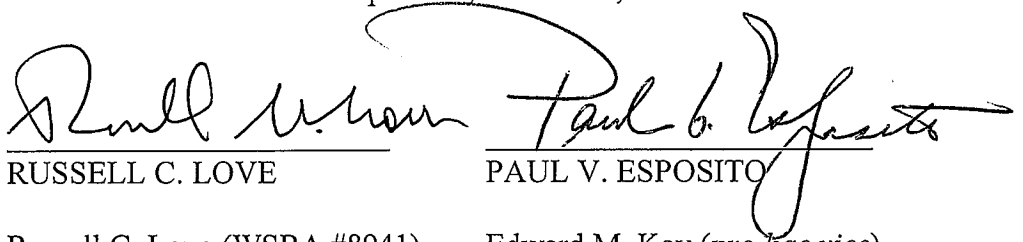
CONCLUSION

With tools like blood alcohol or breathalyzer tests, and through knowledgeable experts, it is relatively easy to prove intoxication. But an alcohol server is not liable for a drinker's intoxication. He is only liable for the failure to recognize its apparent signs when serving the drinker. Under the law of Washington and elsewhere, the difference is pronounced. *E.g., Verni ex rel. Burnstein v. Harry M. Stevens, Inc.*, 387 N.J. Super. 160, 903 A.2d 475, 492 (2006), *certif. denied*, — A.2d — (2007) (remanding for a new trial). Here, plaintiffs offered no competent evidence that the lodge defendants served Kincaid while he was apparently under the influence of alcohol. In their attempts to prove over-service, they introduced evidence and engaged in conduct that prejudiced defendants' right to a fair trial. Their judgment may not stand.

For the foregoing reasons, defendants-appellants Bellingham Lodge #493, Loyal Order of Moose, Inc. and Alexis Chapman urge this Court to reverse the orders entered on November 4, 2005 and January 11, 2006, and to enter judgment for defendants-appellants, or in the

alternative, to remand this case to the superior court for a new trial on all issues, and for such other relief as this Court deems just.

Respectfully submitted,



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REPLY APPENDIX

HOUSE BILL REPORT
HB 2485

As Passed Legislature

Title: An act relating to postjudgment interest on tort judgments.

Brief Description: Revising the rate of interest on certain tort judgments.

Sponsors: By Representatives Lantz, Carrell, Newhouse, Alexander, Jarrett, Moeller, Sommers, Kagi, Upthegrove, Schual-Berke and Darneille.

Brief History:
Committee Activity:
Judiciary: 1/20/04 [DPS];
Appropriations: 1/29/04, 2/4/04 [DPS(JUDI)].
Floor Activity:
Passed House: 2/16/04, 97-1.
Senate Amended.
Passed Senate: March 5, 2004, 43-3.
House Concurred.
Passed House: 3/10/04, 70-27.
Passed Legislature.

Brief Summary of Bill

- Changes the interest rate on certain judgments to two points above the 26-week treasury bill (T-bill) rate, from the current rate which is the higher of 12 percent or four points above the T-bill rate.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Lantz, Chair; Moeller, Vice Chair; Carrell, Ranking Minority Member; McMahan, Assistant Ranking Minority Member; Campbell, Lovick and Newhouse.

Minority Report: Do not pass. Signed by 2 members: Representatives Flannigan and Kirby.

Staff: Bill Perry (786-7123).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill by Committee on Judiciary be substituted therefor and the substitute bill do pass. Signed by 26 members: Representatives Sommers, Chair; Fromhold, Vice Chair; Sehlin, Ranking Minority Member; Pearson, Assistant Ranking Minority Member; Alexander, Anderson, Boldt, Buck, Chandler, Cody, Conway, Cox, Dunshee, Grant, Hunter, Kagi, Kenney, Kessler, Linville, McDonald, McIntire, Miloscia, Ruderman, Schual-Berke, Sump and Talcott.

Staff: Holly Lynde (786-7153).

Background:

Interest accrues on a tort judgment from the date of entry of the judgment at a rate determined as prescribed in statute. That rate is set at the maximum rate allowed under the state's general usury law. It is the higher of the two following rates:

- 12 percent; or
- 4 points above the 26-week T-bill rate established by the Federal Reserve Board.

This method of determining the rate was enacted in 1983 and applies to tort judgments against defendants who are government entities or private entities. Prior to 1983 the interest rate on judgments against private party defendants was 12 percent, and on judgments against the state it was 8 percent.

In 1983 the 26-week T-bill rate averaged 8.75 percent. Adding 4 percent to this amount made the two alternative methods of computing the interest rate for judgments roughly equivalent. Over the past 20 years, the highest average annual T-bill rate was 9.77 percent in 1984. However, since 1991 the T-bill rate has been no higher than 5.59 percent. As a result of these low T-bill rates, 12 percent has been the interest rate on judgments for the past decade or more.

In 1983 the legislation that created the current method of determining the interest rate on judgments expressly made the change apply only to judgments entered after the effective date of the change. (Section 3, Chapter 147, Laws of 1983.) There is case law suggesting that if legislation is silent on the issue, the courts may go either way on the question of whether the new rate will be applied to existing unpaid judgments, as well. Whatever the outcome may be if the Legislature is silent on the subject, it does appear that the Legislature may make an interest rate change apply to existing judgments if it chooses to do so expressly. The courts of this state have said that interest on a judgment is not a matter of contractual right, but rather a matter of legislative discretion. (*Puget Sound Bank v. St. Paul Fire Ins.*, 32 Wn. App. 32 [1982], review denied, 97 Wn 2d 1036 [1982], citing *Palmer v. Laberee*, 23 Wash 409 [1900].)

Summary of Bill:

The interest rate on tort judgments is to be determined by adding two points to the 26-week T-bill rate.

This new method of calculating interest rates applies to interest on judgments still accruing interest on the effective date of the act, as well as to interest on judgments entered after the act takes effect.

An express statement is provided to make it clear that the act does not change the interest rate on legal obligations imposed as the result of a criminal conviction.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: (Judiciary) The current default of 12 percent interest is unreasonably high. The interest on judgments should reflect to some degree economic reality at the time a judgment is entered. The current rate makes considerations of interest charges alone drive decisions on whether to appeal a case. Interest charges on a judgment against a local government can grow to hundreds of thousands of dollars while a case is being appealed. The bill will let appeal decisions be made more on the merits of the case itself. The federal government has adopted an interest rate on judgments tied to the T-bill rate, and the state should do so as well.

Testimony For: (Appropriations) The fiscal note is indeterminate as to savings but there is no cost to local governments. The fiscal note is positive, but indeterminate.

Testimony Against: (Judiciary) Washington is one of only eight states that does not allow pre-judgment interest. This means that an injured party earns no interest at all on the damages he or she is owed up until the time judgment is entered. The current interest rate system is and should be something of a deterrent to appeals which may otherwise be used just to prolong the period before a plaintiff receives payment. The law should retain some fixed benchmark rate to provide certainty.

Testimony Against: (Appropriations) None.

Persons Testifying: (Judiciary) (In support) Malcolm Fleming, Kitsap County Administrator; Paul Chasco, Association of Washington Cities; and Gayla Gjertseal, Washington Insurance Cities Authority.

(Opposed) Larry Shannon, Washington State Trial Lawyers Association.

Persons Testifying: (Appropriations) Sophia Byrd, Association of Counties; and Tammy Fellin, Association of Washington Cities.

Persons Signed In To Testify But Not Testifying: (Judiciary) None.

Persons Signed In To Testify But Not Testifying: (Appropriations) None.

DECLARATION OF SERVICE

On said day below I deposited in the United States mail a true and accurate copy of the following document: Reply Brief and Cross-Appellees' Brief of Bellingham Lodge #493, Loyal Order of Moose, Inc. and Alexis Chapman, No. 57821-9-I, to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 5th day of MARCH, 2007 at Chicago, IL

Manish Shah

Manish Shah